No. 80-919

In the Supreme Court of the United States

OCTOBER TERM, 1980

DAVID N. MOORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner seeks review of his conviction for failure to file federal income tax returns for 1972, 1973, and 1974, claiming that the Forms 1040 that he filed with the Internal Revenue Service for those years met the return filing requirements of the Internal Revenue Code.

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on three counts of failure to file income tax returns for 1972, 1973, and 1974, in violation of 26 U.S.C. 7203. Petitioner was sentenced to 90 days' imprisonment on the first count, with a recommendation for a work release program. The trial court suspended sentence on Counts two and three, and placed petitioner on two years' probation for each count. The court of appeals affirmed (Pet. App. A).

The pertinent facts may be summarized as follows: For 1972-1974, petitioner filed "protest returns" or forms

which provided the Internal Revenue Service with no information from which it could compute a tax. During these years, petitioner was a partner in a jewelry business and the president and part owner of Prestige Vacations, Inc., a travel agency located in Oak Brook, Illinois. In the years in question, petitioner earned gross income in excess of $30,000 per year. For at least five years prior to 1972, petitioner filed valid and complete tax returns (Pet. App. 2).

For 1972, petitioner and his wife filed a Form 1040 containing only their names, occupations, social security numbers, and dependents (Pet. App. 2). Petitioner wrote Fifth Amendment objections across the form and attached tax protest literature to the form. The spaces for financial information were left blank. Although petitioner signed the form, he crossed out the verification calling for imposition of the penalty of perjury for false certification of returns (*ibid.*).

In 1974, petitioner filed an amended form for 1972 for himself. On the line for wages, salary and other compensation, petitioner wrote "none". Below it, he wrote "[o]bject—Fifth Amendment". Under interest income, he put $41, and under dividend income, $22. He again crossed out the certification and signed the form. In 1974 and 1975, petitioner also filed Forms 1040 for 1973 and 1974 which were substantially the same as the amended form that he filed for 1972 (Pet. App. 2-3). After each filing, the Internal Revenue Service informed petitioner that the forms did not constitute sufficient returns (*id.* at 2).

1. The court of appeals correctly held that petitioner had failed to file tax returns because the Forms 1040 he submitted were not verified.

Contrary to petitioner's argument (Pet. 6), the decision below does not create a new test for defining income tax returns. Section 6065 of the Internal Revenue Code of 1954

(26 U.S.C.) provides that returns shall contain or be verified by a written declaration that they were made under penalties of perjury. When petitioner excised the statement of certification under penalty of perjury from the line above his signature, he did not comply with the statutory requirement that returns be verified. This Court has held that a return, unsupported by oath, does not meet the filing requirements when the statute requires that the return be verified by oath. *Lucas* v. *Pilliod Lumber Co.*, 281 U.S. 245, 248 (1930). *Cupp* v. *Commissioner*, 65 T.C. 68, 78-79 (1975), aff'd without opinion, 559 F. 2d 1207 (3d Cir. 1977); *Vaira* v. *Commissioner*, 444 F. 2d 770, 777 (3d Cir. 1971); *Ellison* v. *Commissioner*, 35 T.C.M. 1261, 1263 (1976), aff'd in an unpublished opinion, No. 76-2178 (10th Cir. Jan. 20, 1978).[1]

The determination whether a Form 1040 upon which the verification has been deleted meets the requirement of Section 6065 that a return contain or be verified by a written declaration that it is made under the penalty of perjury does not involve the resolution of any factual questions. Rather, the determination is purely a legal question, and, that should be decided by the trial judge, not by the jury. *United States* v. *Jordan*, 508 F. 2d 750, 753 (7th Cir.), cert. denied, 423 U.S. 842 (1975). Thus, contrary to petitioner's claim (Pet. 5-6), the trial court did not violate his constitutional rights by its instructions to the jury that the forms filed by petitioner were not valid returns under the statute.

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[1]In *Plunkett* v. *Commissioner*, 41 B.T.A. 700, 710-711 (1940), aff'd, 118 F. 2d 644 (1st Cir. 1941), the Board of Tax Appeals (now the Tax Court) concluded that a change in the law, removing the oath requirement and substituting a verification subject to perjury penalties, was merely a change to avoid inconvenience to taxpayers and was not intended to change the result in *Pilliod Lumber Co.* See also *Cupp* v. *Commissioner*, *supra*, 65 T.C. at 79.

2. Petitioner further argues (Pet. 8) that the decision below conflicts with *United States* v. *Long*, 618 F. 2d 74 (9th Cir. 1980). There, the taxpayer filed Forms 1040 on which he had inserted zeros in the spaces calling for number of exemptions and amounts of income, tax, and tax withheld. He also attached a copy of a tax protest tract to his Form 1040. On these facts, the court of appeals reversed a conviction for failure to file tax returns on the ground that the zeros entered on the forms constituted information from which the tax could be computed. As the court saw the matter, "[t]he I.R.S. could calculate assessments from Long's strings of zeros, just as it could if Long had entered other numbers. The resulting assessments might not reflect Long's actual tax liability, but some computation was possible" (618 F. 2d at 75). On this basis, the court distinguished the case from *United States* v. *Porth*, 426 F. 2d 519 (10th Cir.), cert. denied, 400 U.S. 824 (1970), and similar cases in which the defendants failed to complete tax forms or left them blank (618 F. 2d at 75-76). Although the court in *Long* held that the government did not prove the defendant guilty of failure to file, it observed that the government might have sustained some other charge (presumably a charge of filing a false return) (*id.* at 76).

We question the soundness of the ruling in *Long* that the Internal Revenue Service could calculate tax liability from the zero entries so that the defendant's form in that case met the return filing requirements. At all events, the decision below does not conflict with *Long*. The instant case was not decided upon the basis that the Forms 1040 petitioner submitted did not contain information from which tax liabilities could be computed, but rather, upon the basis that the Forms 1040 were not verified as required by the statute. Indeed, the court of appeals expressly recognized (Pet. App. 8 n.2) that its disapproval of *Long* was dictum.

Moreover, even if the forms petitioner submitted had been verified, the facts of this case are not sufficiently comparable to *Long* to establish a conflict of decisions. While the defendant in *Long* simply entered zeros on his Form 1040, here petitioner entered no numbers on his forms from which his tax arguably could be computed. To the contrary, he simply entered the word "none" or "[o]bject—Fifth Amendment," or a combination of both. On two lines, he entered token figures for interest and dividend income. The Internal Revenue Service could not have computed his total tax liability from these figures. Indeed, this case is comparable to one in which this Court recently declined review. See *United States* v. *Smith*, 618 F. 2d 280 (5th Cir.), cert. denied, No. 79-6894 (Oct. 6, 1980). There, the defendant reported on his form that he had "[l]ess than $750.00 constitutional dollars as defined by the U.S. Constitution" and that "$ is used to indicate constitutional dollars (gold or silver coin)" (79-6894 Pet. 4). Similarly, petitioner explained in a letter he wrote to the Internal Revenue Service (Pet. App. 2; Def. Exh. 2) that he believed that Federal Reserve Notes were not money and that he was not subject to any tax liability because he had not earned any gold and/or silver coin. Thus, it is clear that petitioner was reporting that he received no "income," as he defined that term—not that he had no "income" as that term is defined by Congress in Section 61(a) of the Internal Revenue Code of 1954. See *United States* v. *Edelson*, 604 F. 2d 232 (3d Cir. 1979); *United States* v. *Brown*, 600 F. 2d 248, 251 (10th Cir. 1979). As in *Smith*, *supra*, the court below therefore correctly affirmed petitioner's conviction for failure to file a return from which his tax could be computed.[2]

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[2]While perfect accuracy is not necessary to rescue a tax return from being a nullity, the return must be sworn to and evince an "honest and genuine" endeavor to satisfy the law. *Zellerbach Paper Co.* v. *Helvering*, 293 U.S. 172, 180 (1934). Thus, contrary to petitioner's assertions

Thus, even on the assumption that *Long* correctly held that the Internal Revenue Service could calculate tax liability from a "string of zeros," the Ninth Circuit's reasoning in that case would not support petitioner's claim. By prescribing his own definition of income, petitioner gave the Internal Revenue Service no basis from which his tax liability could have been computed. Hence, it does not appear that the Ninth Circuit—which addressed the question whether tax liability can be computed from zero entries—would have reversed petitioner's conviction for failure to file.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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(Pet. 7-9), the "honest and genuine" standard is not new to the law. See also *United States* v. *Brown*, 600 F. 2d 248 (10th Cir. 1979) (when accused is charged with failure to file and it appears that the return is a pretext, it is tantamount to not filing at all).